ADZMI ALI & ANOR.

v.

MOHD. ISA KASAD

SUPREME COURT, KUALA LUMPUR
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 277 OF 1986]
10 JANUARY 1987

CIVIL PROCEDURE: *Appeal by defendants against decision of Judge dismissing their application by motion to set aside an interlocutory judgment in default of appearance and final judgment - Defendants' earlier application by summons to set aside the interlocutory judgment in default of appearance dismissed by Judge - Whether defendants entitled to make second application.*

This was an appeal by the appellants/defendants against the decision of the learned Judge dismissing their application made by motion to set aside an interlocutory judgment in default of appearance and final judgment assessing damages in the sum of RM241,032. The defendants had made an earlier application by summons to set aside the interlocutory judgment in default of appearance. The application was dismissed with costs and no appeal against the order was made. After damages had been assessed and final judgment accordingly entered in favour of the respondent/plaintiff, the defendants applied by motion to set aside both the interlocutory judgment and final judgment arguing that they could do so as the relief claimed in the notice of motion was different from that claimed in the pending summons.

Held:

[1] Following *Hock Hua Bank Bhd. v. Sahara bin Murad and Re VGM Holdings Ltd.*, the motion should be dismissed with costs because of the doctrine of *functus officio* in view of the dismissal of the defendants' earlier application by the summons-in-chambers for setting aside the interlocutory judgment.

[2] When an aggrieved party was dissatisfied with the decision of the learned Judge to set aside a default judgment (final judgment under O. 12 r. 1(1) of the Rules of the High Court 1980 or an interlocutory judgment with damages to be assessed under O. 13 r. 2) the proper procedure to be followed was by way of appeal to the Supreme Court subject to the provisions of s. 68(1) of the Courts of Judicature Act 1964.

[Appeal dismissed with costs.]

Cases referred to:
Evans v. Bartlam [1937] AC 473
Hock Hua Bank Bhd. v. Sahara bin Murid [1981] 1 MLJ 143
Re VGM Holdings Ltd. [1941] 3 All ER 417

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(a)
Rules of the High Court 1980, O. 13 r. 2, r.1(1), 8, O. 37

For the appellants - G. Sri Ram (C.S. Kumar with Him); M/s. Sri Ram, Zulkifly & Kumar
For the respondent - B.S. Sidhu; M/s. B.S. Sidhu & Co.

JUDGMENT

George Seah SCJ:

This was an appeal against the dismissal of an application by the appellants (defendants in the Court below) to set aside the interlocutory judgment in default of appearance dated 15 March 1985 as well as a judgment assessing damages in the sum of RM241,032 dated 15 June 1985. We think we ought to allude to the relevant facts.

The respondent (plaintiff in the Court below) took out a writ against both the appellants claiming damages for personal injuries and pecuniary losses following a motor accident which took place on 4 July 1983. When the appellants did not enter an appearance after having been duly served with the writ and the statement of claim default judgment was entered against them on 15 March 1985 with damages to be assessed. On 16 May 1985 the appellants applied by summons-in-chambers for the interlocutory judgment in default of appearance to be set aside. The application was supported by an affidavit affirmed by one Ahmad Sukarno bin Abdullah Nawawi. After hearing the oral submissions of learned Counsel for the appellants and the respondent the learned Judge dismissed the application with costs to be taxed on 7 June 1985. There was no appeal against this order.

On 15 June 1985 damages were assessed in the total sum of RM241,032 and judgment was accordingly entered in favour of the respondent against both appellants with costs. Notice of appeal against this judgment was lodged on 9 July 1985 *vide* Supreme Court Civil Appeal No. 232 of 1985.

However, on 19 September 1985 the appellants took out a notice of motion for the interlocutory judgment in default of appearance dated 15 March 1985 and the judgment dated 15 June 85 to be set aside and that leave be given to them to defend the action. This application was supported by seven affidavits affirmed by (1) C. Sri Kumar, (2) Shanmuganathan s/o Thambiah, (3) Atwi bin Munawar, (4) Asmuni bin Malik, (5) Sgt. Detective Mohd. Nor bin Muhamad and (6) Ahmad Sukarno bin Abdullah Nawawi and (7) C. Sri Kumar. On 3 July 1986 the learned Judge dismissed the motion with costs to the respondent to be taxed. The appellants filed notice of appeal against the decision of the learned Judge on 21 July 1986 *vide* Supreme Court Civil Appeal No. 277 of 1986. By consent it was agreed by learned Counsel for the appellants and the respondent that Supreme Court Civil Appeal No. 277 of 1986 be heard first and that the other appeal be stood down.

Learned Counsel for the appellants had submitted that since the relief claimed in the notice of motion was different from that claimed in the summons-in-chambers the appellants were entitled to make the second application. In the summons-in-chambers the appellants applied for the default judgment to be set aside and that they be allowed to file a statement of defence; whereas in the notice of motion they applied for both the interlocutory judgment in default of appearance and the judgment assessing the damages in the total sum of RM241,032 to be set aside and that they be granted leave to defend the action. In our judgment there was no merit in this submission.

Now, when a defendant fails to enter an appearance to a writ for an unliquidated sum, the plaintiff may enter **interlocutory** judgment against him for damages to be assessed [see O. 13 r. 2 of the Rules of the High Court 1980]. On the other hand, if the claim of the plaintiff is for a liquidated amount and the defendant defaults in entering an appearance within the specific time, **final** judgment for the sum claimed may be entered against him [see O. 13 r. 1(1)]. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order [see O. 13 r. 8]. In our opinion, the word "judgment' in

O. 13 r. 8 means a "final" judgment under O. 13 r. 1(1) or an "interlocutory" judgment under O. 13 r. 2 thereof. The term "interlocutory" judgment means that such a judgment is interlocutory only as to amount and is final as to the right of the plaintiff to recover damages. Support for such a construction may be gathered from the speeches of the Law Lords in the case of *Evans v. Bartlam* [1937] AC 473 where their Lordships held that if the default judgment was obtained regularly then there must be an affidavit of merits, meaning that the applicant/ defendant must produce to the Court evidence that he has a *prima facie* defence.

In our opinion, assessment of damages is regulated by O. 37 and when damages have been assessed it becomes a final judgment. On the facts of this case, if the appellants by the notice of motion were relying on O. 13 r. 8 to set aside the final judgment dated 15 June 1985, they must fail because of the doctrine of *functus officio* in view of the dismissal of their earlier application by the summons-in-chambers for setting aside the interlocutory judgment.

In our opinion, when an aggrieved party was dissatisfied with the decision of the learned Judge to set aside a default judgment [final judgment under O. 13 r. 1(1) or an interlocutory judgment with damages to be assessed under O. 13 r. 2] the proper procedure to be followed was by way of appeal to the Supreme Court subject to the provision of s. 68(1)(a) of the Courts of Judicature Act 1964. The authority for this view is *Evans v. Bartlam* (*supra*).

Now, when the notice of motion was set down for hearing the learned Judge should have dismissed it on the ground that he was *functus officio*. For authority of this proposition see the Federal Court case of *Hock Hua Bank Bhd. v. Sahara bin Murid* [1981] 1 MLJ 143 and *Re VGM Holdings Ltd.* [1941] 3 All ER 417. We therefore concur with the learned Judge that the motion be dismissed with costs to the respondent but for different reason.

It follows that the appeal be dismissed with costs to the respondent. The deposit be paid to the respondent on account of taxed costs.

Also found at [1987] 1 CLJ 445